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IN THE

Supreme Court of the United States

October Term, 1943.

No. 949.

UNITED STATES OF AMERICA,

Petitioner,

vs.

LOS ANGELES & SALT LAKE RAILROAD COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

QUESTION PRESENTED.

Petitioner states (p. 2) that the question presented is whether, under the two deeds executed in 1908 and 1918, the removal of oil without interfering with the use of the land as a navigable waterway would cause a reverter to the grantor.

This (with all respect) is an incorrect statement of the true question involved. That question is not whether the removal of oil would cause a reverter to the grantor, but whether, under any circumstances, the United States has the right by virtue of these two deeds to use said lands for the production of oil.

The decision of the Circuit Court was directed solely to this issue and was that, irrespective of questions of

title or reverter, the United States has no right to use the land for any purpose other than a public channel, and hence no right to produce oil therefrom. It based this ruling not on any technical application of the reverter clauses, but upon the intention of the parties as gathered from the deeds taken as a whole and giving effect "to every part thereof." What petitioner seeks is to have this Court find that the parties had a different intent from that found by the Circuit Court.

THE PETITION FAILS TO STATE FACTS JUSTIFYING THE ISSUANCE OF CERTIORARI HEREIN.

The petition is apparently predicated upon the ground that the Circuit Court "has decided an important question of local law in a way probably in conflict with applicable local decisions." To justify the issuance of certiorari on this ground petitioner must show (a) that a controversy exists over an important question of state law, and (b) that the Circuit Court's decision is probably in conflict with decisions of the state courts upon that question. Neither of these situations exist in the present case.

The Decision Is Not in Conflict With Local Law.

The question at issue herein necessarily turned upon the intent of the parties as expressed in the deeds. To ascertain this intent the Circuit Court applied the rules of the California Civil Code for the interpretation of written instruments. There was no controversy in the court below as to what are the correct rules for the interpretation of written instruments, and there is no doubt that the Circuit Court's statement thereof is in harmony with the decisions of the state courts.

The first of those rules is that the instrument* must be construed so as to effectuate the mutual intent of the parties so far as the same is ascertainable and lawful. [Calif. Civ. Code, §1636; R. 567.] The second rule is that "the intention of the parties is to be ascertained from the writing alone, if possible; . . ." [*Id.* §1639; R. 567.] The third rule is that "the whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." [*Id.* §1641; R. 568.] The Circuit Court obeyed and followed those rules implicitly. It found that it was possible to ascertain the intention of the parties from the writing alone and accordingly it was unnecessary to refer to or discuss the evidence of extraneous circumstances. The conclusion of the court was that the parties meant just what they said.

Counsel for petitioner has apparently recognized that the decision is not actually in conflict with any local law. This is indicated by the fact that most of the petition is devoted to the claim (p. 8) that "the court below erred in its purported application of California law to the deeds." Thus the real complaint is not that the Circuit Court decided any question of California law in conflict with local decisions, but that it erred in determining which of two different rules of California law (neither of which has been the subject of controversy herein) should be applied to the particular facts of this case. (See pp. 6 and 7, *infra.*)

It is of course true that under California law, if the court is in doubt as to the intention of the parties it may resort to extraneous evidence to aid in the interpretation

*In California grants are to be interpreted as contracts, *Civil Code,* §1066.

of the instrument. (Calif. Civ. Code, §§1637, 1647; a
C. C. P., §1860.) But "This rule of evidence is invok
and employed only in cases where upon the face of the co
tract there is doubt . . ." (*United Iron Works
Outer Harbor, etc. Co.,* 168 Cal. 81, 84 (1914.)*

The Circuit Court found that upon the face of the co
tract there was no doubt as to the intention of the parti
Hence it was unnecessary to resort to other eviden
There is no conflict with local decisions in this ruli
But petitioner feels that the court should have had dou
as to what the parties intended by the language used
the contract and hence should have considered other e
dence and arrived at a different conclusion. On t
ground petitioner asks that this Court, using the sa
rules of construction, find that the parties had a differ
intention from that found by the Circuit Court. In oth
words, the controversy which petitioner asks this Court
determine involves no conflict between the Circuit Cou
decision and the local applicable law, but relates solely
the peculiar facts of this case.

It follows that even if the Circuit Court erred (wh
we deny) in the application of California law to
particular facts of this case, such error is not the ki
of error customarily reviewed by this Court. Howev
we recognize that this Court's discretion is not control
by the terms of Rule 38, hence we shall proceed to answ
the claim that the Court erred in the proper applicat
of California rules of construction.

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*A partial quotation from this case appears in the footnote
page 17 of the petition, but petitioner has omitted the import
words stating that the rule is invoked only in cases of doubt.

The California Law Governing the Construction of Written Instruments Was Properly Applied to These Deeds.

In determining whether the Circuit Court was justified in finding that the intent of the parties was ascertainable from the deeds alone, it is essential to keep in mind what the deeds really say. We make this rather obvious comment because the only way in which the trial court could find that the deeds permit the government to remove the oil was to distort and revise, and, in effect, rewrite the deeds, and also because all of the decisions relied upon by petitioner to show that the California law was improperly applied involved deeds which lacked the controlling provisions of the deeds herein.

The extent to which it was necessary to distort and change the language of the deeds, in order to find for petitioner is illustrated by the following parallel columns:

1908 Deed	Judgment Paragraph I [R. 121]
". . . [Grantor] does hereby grant to the United States of America for the construction, maintenance and use of a free public navigable channel or waterway *only*,* that certain parcel of land . . ."	"That the United States of America is the owner of the lands conveyed to it . . . in fee simple, absolute *subject only* to the reservation that such property be used for a free, public, navigable channel."

*All emphasis here and elsewhere herein is added.

1908 AND 1918 DEEDS	FINDING VIII [R. 112]
"To have and to hold . . . as and for the purposes of a free, public, navigable channel, . . .	"The Court finds that the two Deeds contained conditions subsequent with provisions for a reverter in the event the plaintiff shall discontinue or abandon the use of the property granted as a free, public navigable waterway, or in the event that plaintiff shall so use the property granted as to substantially interfere with or impede such use, and that in such event the defendant, or its successor in interest, may invoke such condition and accomplish such reversion."
". . . if the use of the said strip of land for the said granted purposes shall at any time be discontinued, or the same be abandoned *or be used for any purposes other than specified herein,* the estate and title hereby conveyed shall, without the necessity of a reconveyance, revert to and vest in the grantor, its successors and assigns."	(Note the omission of the limitation against the use "for any purposes other than specified."

Petitioner endeavors to justify the elimination from the deeds of the express words prohibiting the use of the land for any purposes other than those specified by resort to a so-called "general rule" which is stated as follows (Pet. p. 9):

> "where land is conveyed upon condition that it shall be used for a certain purpose, it is no ground for forfeiture if it is used for other purposes, provided it is also used for the purpose for which it was conveyed."

We do not question the correctness of this statement, but obviously it does not apply to the deeds here in ques-

tion and by implication it misquotes them. There is a vital difference between (a) a deed conveying land upon condition that it shall be used for a certain purpose, with no provision against the use for other purposes, and (b) a deed which provides that land shall be used for a certain purpose and shall not be used for any other purpose. The general rule relied on by petitioner relates to deeds of the former kind, but these are not the deeds before the Court. The deeds before the Court are governed by another rule which is concisely set forth by the California Supreme Court in the case of *Los Angeles Investment Co. v. Gary*, 181 Cal. 680, at p. 683, as follows:

> "Conditions so extreme as to restrain the use to a single specified purpose are not uncommon and so far as we are aware have been uniformly enforced, . . ."

Government counsel have, throughout this entire case, closed their eyes to the obvious distinction between these two types of deed and the two contrasting rules above set forth. They cite (p. 9) eight cases from other states as authority in support of this so-called "general rule." Not one of these cases refers to a deed which contains an express condition against the use for any other purpose than the one specified, with provision for reverter in the event of such other use. Furthermore, in five of these decisions it was held that the *absence* of such a prohibition against other uses was a determining factor. The very cases, therefore, upon which petitioner relies support our claim that where there *is* an express prohibition against other uses, and especially if that prohibition is reinforced by a provision for reverter, such prohibition must be enforced according to its terms.

Petitioner attempts, however, to show that this so-called "general rule" has been adopted in California as a rule applicable to deeds which *do* contain provisions prohibiting other uses. Petitioner's statement in that regard is as follows (p. 10):

> ". . . the California courts have assimilated the situation to that contemplated by the general rule referred to above, and hold that notwithstanding such language a reverter will not be caused unless the additional uses to which the land is put are inconsistent with the specified purpose for which the land was originally conveyed."

By this argument petitioner in effect says that a rule applying only to deeds which contain no provision against use for any purpose other than the ones specified has been adopted in California as the rule applying to deeds which do contain a specific provision against use for any purposes other than specified. If this were true then it would be impossible in California to make a deed which effectively restricts the use of land to one specified purpose. In other words, counsel urges that the provision of the deeds herein which provides that the estate and title conveyed shall revert to respondent if the land "shall at any time . . . be used for any purposes other than specified," must, under California law, be entirely disregarded. The many California cases cited in the Circuit Courts' opinion demonstrate that this is a misstatement of the California law, and, indeed, of the general common law governing the construction of written instruments. No California case holds that such a provision in a deed may be disregarded.

The only California decision which petitioner cites in support of the so-called general rule is *City of Long Beach v. Marshall,* 11 Cal. (2d) 609. But, as we have shown,

this "general rule" has no application to the deeds herein. Furthermore, the *Long Beach* case does not hold or even intimate that a condition in a deed restricting the use of land to a specified purpose, with provision for reverter if used for any other purpose, is ineffective or may be disregarded.

The case involved a legislative grant of tidelands from the State of California to the City of Long Beach. The language of the grant was materially different from the deeds herein. There was no provision for reverter and the uses and purposes of the grant were much broader. The difference in the wording* is so great that the *Long Beach* case could not be considered as authority in the present case.

Two questions were considered by the court: (a) whether the legislative grant conveyed the fee or an easement, and (b) if the fee was conveyed, whether the limitations of use were such as to prevent the city from taking the oil. The attorney general contended in behalf of the state "that there was no conveyance of the fee, and that the city received only the governmental power of administration of the lands, together with an easement or right to use them for specified purposes." (11 Cal. (2d) 614.) The city contended (a) that the grant conveyed the fee, and (b) that the limitations of use, if they should be deemed to exclude drilling for oil, had been waived and released by the charter amendment of 1937.

The court decided both questions in favor of the city's contentions. The opinion is devoted almost entirely to the question of fee or easement. The conclusion that a fee

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*See Appendix "B," p. 16.

was conveyed was predicated primarily upon the following particular wording of the grant:

> "There is hereby granted to the City of Long Beach . . . all the right, title and interest of the State of California . . . in and to all the tidelands . . ."

The court held:

> "The language granting 'all right, title and interest' clearly indicates an intent to transfer the state's fee title." (11 Cal. (2d) 616.)

(There is no similar or comparable language in the deeds involved herein.) The court then discussed the legislative and judicial history of the numerous similar tideland grants to California cities, and pointed out that it strongly confirms the conclusion that those grants were intended to convey the fee. (There is, of course, no similar or comparable feature in the present case.) Having thus determined that the grant conveyed the fee, the court disposed of the remaining question of the city's right to drill and take the oil, by pointing out in a brief paragraph (*id.*, p. 620), that this question was concluded by the charter amendment of 1937, saying:

> "The final question is whether the city has the right to drill for and extract the oil from these lands which it owns. Nothing in the grant purports to reserve to the state or to deny to the municipality the minerals or the right to extract them. Moreover, the charter amendment, section 229x, approved by the legislature in 1937, expressly and unequivocally empowers the city to drill, develop, take and dispose of oil on tidelands owned by it. Hence, the ownership of the lands being once established in the city, its authority to do the acts contemplated is placed beyond question by this express charter provision."

In California, an act of the legislature approving a municipal charter, or an amendment thereto, is a law of the state, of equal force and effect with other statutes. Like other statutes, it operates to repeal all prior laws inconsistent therewith. (*City of Oakland v. Hogan,* 41 Cal. App. (2d) 333, 342 (1940); *C. J. Kubach Co. v. McGuire,* 199 Cal. 215, 217 (1926).) Therefore, the charter amendment of 1937 settled the question of the city's right to take the oil and it was unnecessary to determine the effect of the limitations in the original grant, that question having been rendered *moot* by the charter amendment. No waiver or release by the Railroad Co. comparable to the act of the state approving the Long Beach charter amendment exists in the present case.

It is clear, therefore, that the *Long Beach* case in no way supports the claim that the rule applicable to deeds containing *no* prohibition against other uses has been "assimilated" in California as controlling the interpretation of deeds which *do* contain such a provision. As noted in the Circuit Court's opinion, there are many California decisions holding that the right to annex such exclusionary restrictions to a conveyance of property "is a necessary incident of the right to own and convey," and such conditions when clearly expressed have always been enforced. Prominent among these cases is *Pavkovich v. Southern Pacific R. R. Co.,* 150 Cal. 39 (1906), where a condition with a reverter very similar to the one contained in the two deeds here before the Court was upheld and enforced.

Counsel assert (p. 13, footnote) that in the case of *Central Land Co. v. City of Grand Rapids,* 302 Mich. 105, 4 N. W. (2d) 485, the Michigan court adopted the "same

doctrine followed in the California cases." With all respect we challenge the correctness of this statement. There was a strong dissent in the Michigan case, in which it was pointed out that the decision was squarely in conflict with the California rule. This dissent cited *Marshall v. Standard Oil Co.,* 17 Cal. App. (2d) 19, as evidence of what the law is in California and what it ought to be in Michigan. Furthermore, the Michigan decision was predicated largely upon a peculiar Michigan statute quoted in the decision (4 N. W. (2d) at p. 490) which is directly contrary to the provisions of Sections 1683 and 1066, California Civil Code.

The case of *Marshall v. Standard Oil,* 17 Cal. App. (2d) 19 (1936), involved a deed to the City of Huntington Beach with a covenant that the land "is to be used exclusively for street purposes, . . ." There was no condition with reverter as in the deeds herein. The case did not, as counsel asserts (p. 13), turn on the question of the extent to which oil drilling would interfere with the use for street purposes. On the contrary, the court specifically stated that "the real question to be determined in this cause is whether the premises involved were accepted by the City of Huntington Beach upon trust for the purposes specified . . ." (17 Cal. App. (2d), p. 22.) On this question the court definitely held (without regard to any alleged interference) that a conveyance for a special and exclusive purpose imposes a trust on the part of the grantee which must be enforced according to its terms.* This case is squarely in point with regard to the language in the granting part of the 1908 deed, *i. e.,* "grant . . . for the construction, maintenance and use of a free, public navigable channel or waterway only," and holds that such

language effectively prohibits the use of the lands for the production of oil.

Furthermore, it should be borne in mind that the deeds in the case at bar present a much stronger case for the prohibition of drilling than the deed in the *Marshall* case, for, as above stated, that deed contained no provision for reverter. The existence of a reverter provision constitutes the strongest possible evidence of intent that the land should *not* be used for any purpose other than specified.

The Rule of Ejusdem Generis Has No Application.

In a further effort to erase from the deeds the express prohibition against the use for any purpose other than specified, petitioner asserts (pp. 13 and 14) that the *ejusdem generis* rule should be applied. If this argument were accepted, it would mean that when the parties agreed that the land should be used for no other purpose than the one specified they meant the same thing as they did when they agreed that the land should revert if the channel should be abandoned or discontinued. There is no place in these deeds for the application of the *ejusdem generis* rule. Furthermore, such a rule if applied in this case, would be squarely contrary to the provisions of §1641, Civil Code, which requires that, if reasonably practicable, effect must be given to every part of the deed. *Ejusdem generis* is not a mandatory rule nor even a rule of law. (*City of Los Angeles v. Superior Court,* 2 Cal. (2d) 138, 140 (1934).) Even if it were applicable here it must yield to the statute.

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*The question of interference was entirely incidental to the main issue and arose primarily in connection with the claim of abutting property owners that drilling would interfere with their access to the street.

The extent to which the California courts have gone giving effect to every part of a deed is illustrated in *Rosecrans v. Pacific Electric Ry. Co.*, 21 Cal. (2d) 602 (1943). In this case the court construed a deed containing a condition subsequent requiring that the grantee "shall establish and maintain" certain railway service. The Supreme Court of California held (21 Cal. (2d) at 606),

> "that the specified passenger service must be both established and maintained. Effect should be given to both of those words."

The service had been established and maintained for years, nevertheless the court enforced a reverter on the ground that the cessation of service was a breach of the condition requiring that service be "maintained."

This case strongly supports the Circuit Court's decision and completely disposes of the argument that distinct and independent events of reverter can be treated as all meaning the same thing.

The Circuit Court Considered Every Part of Each Deed, and its Decision as to the Intent of the Parties Is Supported by All the Terms and Provisions of the Deeds.

Petitioner asserts (p. 13) that "the court assumed itself bound by one particular phrase contained in the deeds, the phrase 'used for any purposes other than specified herein,' . . ." There were two good reasons why the court should have made special mention of this phrase: one, that the trial court had completely ignored it and refused to give it any effect whatever; the other, that this phrase furnishes the strongest possible evidence of the intention of the parties to limit the use of the land to channel purposes only. But the suggestion that the Circuit C

based its decision on this one phrase without considering other parts of the deeds is negatived by the decision itself. The court specifically stated that effect must be given to all parts of the deeds and, among other things, said:

> "When effect is given to every part of each deed, it is clear that the mutual intention of the parties at the time the deeds were executed was that appellee should use the land for the purposes of a free, public, navigable channel and should not use it or have the right to use it for any other purpose. That intention was lawful. Therefore, the deeds must be so interpreted as to give it effect." [R. 568.]

This disposes also of the assertion (p. 21) that the court "totally disregarded the provisions of the deeds requiring approval of the United States of any 'use and occupation by the grantor . . . of the unused portion' of the lands conveyed."

But even if it could be assumed that the court disregarded this clause, there is nothing in it which is inconsistent with the intention of the parties as found by the Circuit Court, nor is the clause "meaningless and absurd" (as counsel asserts) if the United States has no right to use the land for other than channel purposes. This clause does not confer upon the grantee the right to use the land for any purposes other than a channel nor does in in any way enlarge grantee's right to the use of the land. On the contrary, it reserves to the Railroad Company the right to use and occupy the land for any purpose until it is required for the purpose of "enlarging the channel." This emphasizes the fact that the *only use* the United

States can make of these lands is for channel purposes. If the channel had never been enlarged the unused portion would still be subject to the exclusive use and possession of the Railroad Company. The United States could not have taken it for oil development but only for enlarging the channel.

The provision that any use by the grantor of the portion not immediately needed for a channel must be *approved* by the United States merely protected the grantee against uses by the Railroad Company which might encroach upon the channel.

There are other provisions of the deeds, not specifically mentioned, which strongly support the Court's decision. One of these is the clause (in both deeds) providing that the United States shall have and hold the land "*as* and *for* the purposes of a free public navigable channel, and subject *for such purposes* to the control, improvement and regulation of said grantor." This clause not only limits the estate conveyed but also limits the government's right of control and regulation to the one purpose of a channel. If the grantee's right to use the land had been unlimited there would have been no need to provide that the United States should have the power of "control" and "regulation" for channel purposes. It is this clause, and not the one referred to by petitioner, that would be meaningless and absurd if the parties had intended that the land might be used for any purposes other than a channel.

Mention might also be made of the words "*rights* herein granted" and "granted *purposes*," which appear in both deeds. These words give additional emphasis to the intent of the parties to limit the use to channel purposes, as found by the Circuit Court. It is apparent that a discussion of

other parts of the deeds would not have changed the result.

In the footnote to page 14 of the petition reference is made to the phrase in the granting clause of the 1908 deed "for the construction, maintenance and use of a free, public, navigable channel or waterway only." Petitioner concedes that this indicates the exclusion of secondary uses, but argues that no effect can be attributed to it because it was omitted from the second deed. Obviously, the clause *does* indicate an intent to exclude any uses other than a channel or waterway. But since the same intent is even more strongly evidenced by the reverter clauses which are alike in both deeds, the Court did not find it necessary to discuss this clause in the 1908 deed. For this reason it is unnecessary for us to answer petitioner's argument that no reliance on the clause would have been justified because of its omission from the 1918 deed. But we do not concede that any such result follows. On the contrary, if it be deemed pertinent to consider the surrounding circumstances, such consideration would show that the second deed was intended by both parties to be identical with and to contain the same limitations as the first deed. [See Appendix, p. 11, *seq.*]

The Intent of the Parties Being to Limit the Use to Channel Purposes Only, a Mineral Reservation Would Have Been Superfluous and Unnecessary.

Petitioner puts much emphasis upon the fact that the deeds contain no express "mineral reservation." (Pet. pp. 15, 17, 18 and 19.) This argument begs the whole question. If, as the Circuit Court found, the parties intended to restrict the use of the land to the one purpose of a channel, a mineral reservation would have been wholly

superfluous. The fact is that these deeds go far beyond the mere reservation of oil rights and expressly prohibit *all* uses except the use for a public channel. The grantor was not seeking merely to reserve minerals, but was putting it beyond the power of the grantee to make any use of the property except the one use which both parties then had in view.

In this connection the petitioner states (pp. 22, 23) that the case of *Los Angeles University v. Swarth*, 107 Fed. 798, held "that such a covenant, as distinguished from a condition, was not enforceable by the grantor." We respectfully submit that this is an incomplete and misleading statement of what the court held. Its conclusion that the covenant was not enforceable by the grantor was expressly predicated upon the ground that the grantor had retained no interest in the premises in favor of which the covenant was created and, therefore, was a mere intruder having no standing in equity to enforce the covenant. This, the court said, was "the precise question" in the case. (p. 805.) In the case at bar it is admitted that the grantor owns the land adjoining the channel on both sides, for the benefit of which the covenants and conditions in the deeds were created. It therefore has a direct interest in the enforcement of these covenants and conditions according to their terms. Failure to enforce them would be squarely contrary to the *Swarth* case. Furthermore, the statement in the petition that "notwithstanding the reference to 'express condition' the court [in the *Swarth* case] had treated the restriction as a covenant," is not in accord with the facts of that case. The original deeds contained both a covenant and a condition subsequent with right of reverter, but expressly provided that the right of reverter should not exist after a specified

date. The action was brought subsequent to this date and the condition had, therefore, expired and the grant had become absolute, subject only to the covenant which, as above stated, was unenforceable because the grantor had parted with all of the lands for the benefit of which the covenant had been made. There was nothing whatever in that case, nor was there any other reason, which would have caused railroad counsel, who were preparing a deed which was to convey a right to the use of land for purposes of a channel *only*, and to revert if used for any other purpose, to include in such a deed a reservation of minerals. It is more likely that they had in mind *Pavkovich v. So. Pac. Co.*, 150 Cal. 39 (1906), which contains a condition very similar to those in the deeds herein and is authority upon California law.

The Real Issue Herein Was Whether the Government Has the Right to Extract the Oil Underlying the Channel. The Court Was Not Required to Decide Other Questions.

It is not the fact, as asserted by petitioner (p. 14), that the principal issue in the District Court was whether the deeds conveyed the fee or an easement. This question was argued in the courts below, not as an ultimate issue in the case, but only as it might aid in the determination of the ultimate question whether the petitioner has the right to take the oil underlying the channel. That, as shown by paragraphs VII and IX of the complaint [R. 6, 7] was the one question, and the only one, which petitioner needed to have answered by the court.

Petitioner alleged that it had received applications for federal oil leases on this land and that respondent had protested, on the ground that the granting thereof "would defeat the purposes for which said two deeds were de-

livered and would thereby adversely affect the right, title and interest" of respondent. [R. 6.] Petitioner traversed this assertion by the allegation "That the defendant has no right, title or interest in the lands . . . which would be 'adversely affected,' infringed or impaired by the extraction by plaintiff of oil and gas . . ." [R. 7.] Thus the issue was definitely framed; to-wit, Has the petitioner the right under the deeds to extract the oil and gas? That is the only question which need be answered for all practical purposes of this case. It was answered directly and unequivocally by the Circuit Court. That answer entirely disposes of this case. Petitioner, having no right to take the oil and gas, has no justiciable interest in the question who owns the fee. That question is *moot,* in so far as petitioner is concerned. It is the law in California, as elsewhere, that "An appellate court will not review questions which are *moot* and which are only of academic importance." This rule applies *a fortiori* where such review is sought by a party having no substantial interest therein. (*Keefer v. Keefer,* 31 Cal. App. (2d) 335, 337 (1939).)

It follows that there is no basis for the claim of petitioner (p. 16) that the refusal of the Circuit Court to pass upon the question whether the deeds conveyed a fee or easement was probably in conflict with local decisions. Furthermore, the case of *Marshall v. Standard Oil Co., supra,* is direct authority against this claim. In that case the question whether the deed conveyed a fee or easement was extensively argued in the briefs. The court, as in the present case, declined to pass on this issue, saying (p. 25):

> "We do not need to give any attention to whether the instrument involved did or did not amount to a

dedication, nor does it seem to us material to dwell upon the question as to whether the City of Huntington Beach owns all the lands, minerals, etc. contained under the surface within the boundaries set forth in the deed. If the right to the premises or title to the premises was accepted upon trust, the right to have that trust enforced is vested in the grantor."

The above California cases fully support the Circuit Court's ruling that it was unnecessary to decide whether the deeds convey a fee or an easement.

Petitioner has failed completely to show that the California law was not properly applied to the deeds in question. On the contrary, all the California cases which are in any way pertinent fully support the Circuit Court's decision.

Petitioner urges (footnote, p. 15) that in considering California law special consideration should be accorded to the decision of the District Judge because he served for eight years on the Superior Court of Los Angeles County. With all respect to the District Judge, we feel it is a fair assumption that the three circuit judges who concurred in this decision have some knowledge of California law, especially in view of the fact that one of them was for many years a Justice of the Supreme Court of California, and another had practiced law in that state thirty-eight years.

Resort to Surrounding Circumstances Would Not Have Changed the Result.

Petitioner asserts (p. 17) that resort to surrounding circumstances would have disclosed the complete absence of any intention "to preclude the United States from the enjoyment of such minerals as might be found to exist";

and, again (p. 20), that the documents surrounding the execution of the deeds make it clear that the parties "intended an outright transfer of the fee to the United States." Petitioner's recital of the surrounding circumstances, which petitioner states would lead to these conclusions, is, with all respect, both incomplete and inaccurate. To answer these assertions would require a detailed analysis of a large amount of documentary evidence. We do not believe such an analysis is called for here. The decision of the Circuit Court that resort to extraneous evidence is unnecessary is fully in accord with California law. A detailed analysis of such evidence would, therefore, be irrelevant to the question now before the Court, *i. e.,* whether a writ of certiorari should be granted. However, for the information of this Court, if it so desires, we include as an appendix hereto an analysis of the more important portions of this evidence which, we contend, shows beyond question that if the Circuit Court had found it necessary to resort to surrounding circumstances to determine the intent of the parties, the result would have been the same. Indeed, it was and is our contention that the surrounding circumstances show definitely and almost conclusively that it was the intention of the parties that the deeds should convey only an easement of use for the purposes of a free, public, navigable channel only.

Finally, it should be borne in mind that the Circuit Court was informed as to all surrounding circumstances, the evidence thereof being set forth in the record and discussed fully in the briefs.

THERE IS NO PUBLIC INTEREST WHICH REQUIRES DETERMINATION OF THE QUESTION WHETHER THE FEE OR AN EASEMENT WAS CONVEYED.

Under Point 4 (p. 23) counsel urges that it "is of great importance to the Government for practical purposes . . ." to have this question determined. He asserts that, if the fee passed, both parties are precluded by this decision from recovering the oil, in the face of "the urgent present-day need to use all available sources of supply . . ." This result will not follow.

Admittedly, there are valuable deposits of oil and gas underlying the channel. (But the fantastic "estimate" (p. 2) of "14,000,000 barrels" of recoverable oil is without the slightest support in the record.) It does not follow, however, that these deposits will be lost to the world if this decision stands,— even though it be assumed (certainly not conceded) that petitioner owns the fee. Ownership of oil and gas in place is not the rule of property in California. It is now settled law in California that "if an adjoining owner drills his own land and taps a deposit of oil or gas, extending under his neighbor's field so that it comes into his well, it is his property." (*People v. Associated Oil Co.*, 211 Cal. 93, 101 (1930); *Callahan v. Martin*, 3 Cal. (2d) 110, 117-8 (1935).) The Court knows judicially that oil and gas are fugitive substances, capable of flowing from place to place, and hence are susceptible of being drawn off by wells from any point, provided they penetrate into the reservoir. (*Ohio v. Indiana* (1899), 170 U.S. 190-201.)

That the oil and gas underlying the Cerritos Channel can be withdrawn through wells bottomed in the adjoining lands along the channel is confirmed by the uncontradicted testimony of William Reinhardt. (R. 449, 450, 457.) He testified that respondent's well-spacing program in this field is on a ten (10) acre basis, with the Channel area a part of that spacing program. This means that its wells are bottomed approximately 660 feet apart so as to effectively drain the entire area, including the Cerritos Channel area, which is only 600 feet wide. Thus, no waste of natural resources can result from this judgment, the oil and gas will not be frozen in place, as petitioner contends (p. 22), nor will respondent be precluded from recovery as contended (p. 24), and there need be no occasion for the "negotiations" referred to by petitioner (p. 24).

It is but just that respondent should have the benefit of this oil and gas, for, as the Court held in *Pavkovich v. So. Pac., supra,* it must be assumed that the limitations and conditions contained in these deeds were agreed upon and included in the deeds for the very purpose of protecting the grantor against just such exploitation as is now proposed and hence the grantee is in no position to complain of their enforcement. Further specific authority for the justice of respondent's position in this regard is found in *Marshall v. Standard Oil Co., supra,* where the court held that a covenant not nearly so strong as in the present case must be construed in the light of the fact "that the grantor owned the premises on both sides of the right of way conveyed, and therefore limited the purpose for which the premises could be used, in view of the fact that oil wells sunk on the narrow strip would drain oil from the

adjoining premises owned by the grantor." (17 Cal. App. (2d) p. 28.)

Furthermore, the only consideration given by petitioner for the deeds was the grant of the permit to dredge Cerritos Channel and to fill up Cerritos Slough, which was narrow, tortuous and shallow—navigable in fact only by very small boats at periods of high tide. In return therefor petitioner obtained a free, public, navigable channel which is wide and deep and straight, and which was dredged, redredged and improved over a period of twenty-two years at the sole cost of this respondent and the City of Long Beach. [R. 348-350.]

There is nothing at stake in this action except dollars. The real question at issue is who shall get the money proceeds of the oil and gas. The fact (if it be the fact) that the amount involved is large, does not make this "a question of general importance," so as to require the interposition of this Court.

As to petitioner's contention (p. 8) that the deeds herein present a frequently recurring problem, it is wholly improbable that a decision as to the interpretation of the particular language of the deeds herein (and surrounding circumstances, if those should be considered) would settle the problem of the interpretation of other written instruments which, in the nature of things, would almost certainly contain different language and be surrounded by different circumstances.

We could almost believe that the former Chief Justice had this identical case in view when he said:

> "But we find that a very large proportion of the applications [for certiorari] are without substantial grounds. . . . For example, we have many applications where the questions raised are those *relating to particular contracts* or transactions and turn upon the facts of the particular case, and there is no controversy of importance with respect to legal principles . . . It is not the importance of the parties or the amount involved that is controlling, but the need of securing harmony of decision and the appropriate settlement of questions of *general importance* so that the system of federal justice may be appropriately administered."*

Respectfully submitted,

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*From an address by Mr. Chief Justice Hughes before the American Law Institute, reported in Vol. XX, American Bar Association Journal, p. 341.